SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 877.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

W. R. CRESS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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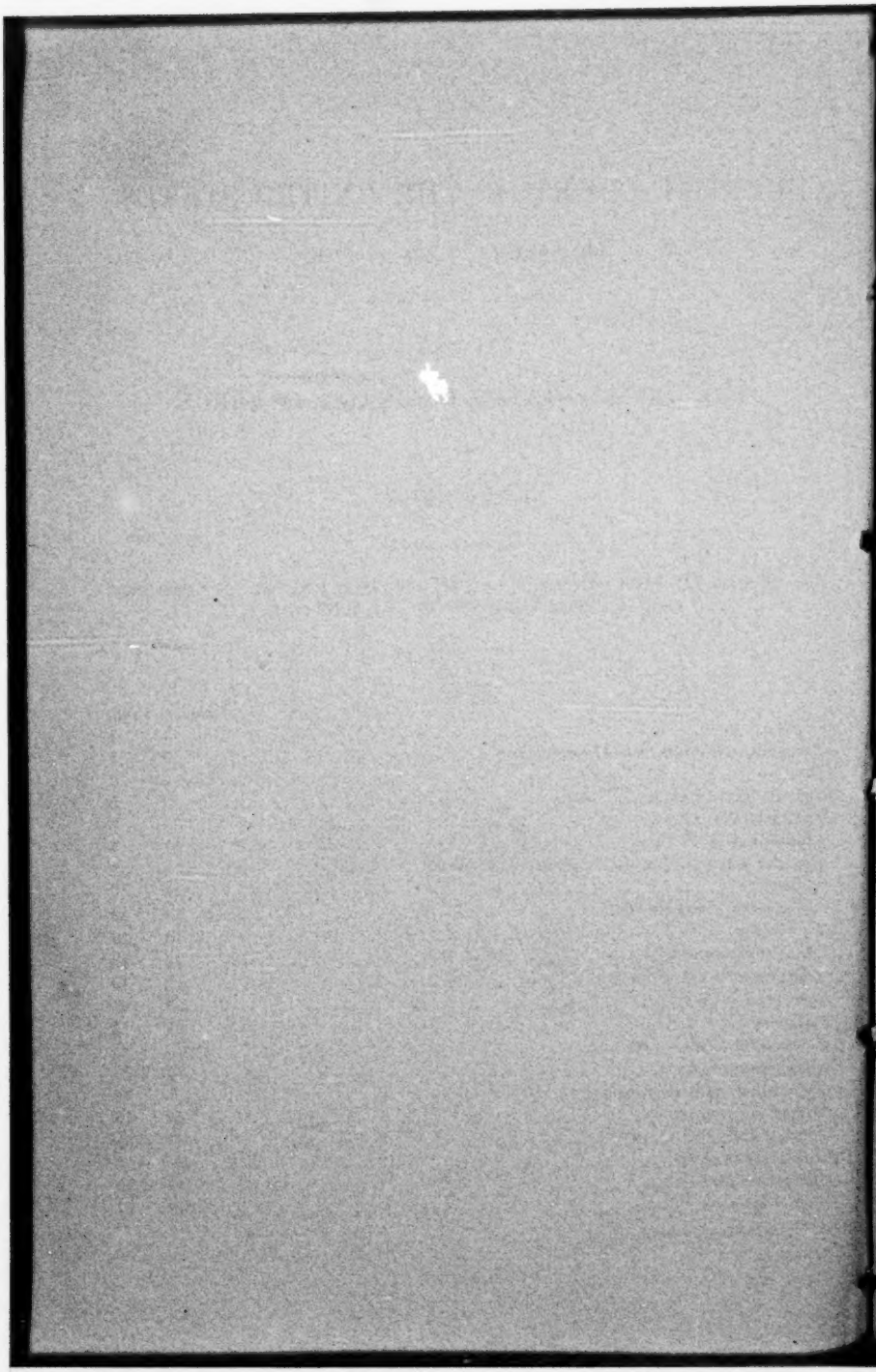

1 Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal court hall in the city of Covington, Kentucky, on Monday, April 6th, A. D. 1914, and of our Independence the 138th year.

Court met.

Present. Hon. A. M. J. Cochran, judge.

W. R. CRESS, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } 2875.

Transcript of orders.

(From London—Filed Sept. 15, 1913.)

Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at the Federal court hall in the city of London on Monday, May 12, A. D. 1913, and of our Independence the 137th year.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT.

Transcript of orders.

2 Be it remembered that heretofore, to wit, on November 29th, A. D., 1912, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

By agreement of parties this cause is continued generally.

And on a day following, to wit, on April 23, A. D. 1913, an order was made and entered herein being in words and figures as follows, to wit:

Order.

Upon motion of the defendant, the United States, it is ordered that the defendant will be and is hereby granted thirty days additional time in which to file answer herein.

And on a day following, to wit, on May 16, A. D. 1913, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

Come the plaintiff, by attorney and on his motion, the court being advised this cause is continued generally for preparation.

And on a day following, to wit, on June 27, A. D. 1913, an order was made and entered herein being in words and figures as follows, to wit:

Order.

This day come E. P. Morrow, U. S. attorney, and presented and offered for filing an answer herein, and the court being advised, it is now ordered that said answer be and it is hereby filed and noted of record.

3 And on a day following, to wit, on September 10, A. D. 1913, an order was made and entered herein, being in words and figures as follows, to wit:

Order.

By agreement of the plaintiff and the defendant herein this action was directed to be transferred from the United States court, London, Kentucky, to the United States court at Covington, Kentucky, where the same will stand for trial.

Certificate.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the United States District Court for the Eastern District of Kentucky, at London, Kentucky, do hereby certify that the foregoing is a true and correct copy of all orders made and entered herein in the matter set out in the caption hereto as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at London, Kentucky, this 10th day of September, A. D. 1913, and of our independence the 138th year.

[SEAL.]

J. W. MENZIES, *Clerk.*
By S. W. STACEY, *D. C.*

4 *Petition.*

(Filed November 1, 1912.)

In the United States District Court for the Eastern District of Kentucky, sitting at London, Kentucky.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANTS.

The plaintiff, W. R. Cress, states that he is now and has been for more than twenty years a citizen and resident of Wayne County, State of Kentucky, in the eastern district thereof.

Plaintiff says that he is now and has been and was at all the dates hereinafter mentioned the owner seized in fee simple and in the actual possession of a certain boundary or tract of land situated in Wayne County, Kentucky, on the waters of Whiteoak Creek and the Cumberland River, lying on the north side of said Cumberland River and principally on the west side of said Whiteoak Creek, adjoining the lands of Hiram Taylor's heirs on the north, the lands of I. S. Brown and Y. W. Burton on the east, the lands of W. W. Burton on the south, and of Y. W. Burton and Hiram Taylor's heirs on the west, containing one hundred and eighty-nine acres.

Plaintiff says that said farm of 189 acres consists of about twelve acres of bottom land, of which about 7 acres is first or lower bottom and five acres second or upper bottom, and that the remainder of said farm outside of the creek or river bluff is what is known as upland and is likewise good for farming and grazing purposes.

5 Plaintiff says that between the years 1908 and 1911, inclusive, the defendant, the United States of America, its officers, agents, servants, and employees, built and constructed a lock and dam upon and across said Cumberland River in the county of Wayne, at a point known as Gann's Island, and known as Lock Number Twenty-one, and being some twelve or fifteen miles below plaintiff's said farm, and so built and constructed said Lock and Dam Number Twenty-one in such manner and to such a height that the waters of said river were thereby obstructed and impeded in their natural flow and were dammed up and held back to such an extent as to raise the natural level of said water at the mouth of said Whiteoak Creek and along the bank thereof adjoining and through plaintiff's farm to the height of about fifteen feet, when said dam was completed and filled with water, to wit, in October, 1911.

Plaintiff says that since the completion of said lock and dam the said defendant, its officers, agents, servants, and employees have continuously maintained and operated same, and will perpetually hereafter so continue to operate and maintain said lock and dam.

Plaintiff further says that the effects of the construction, operation, and maintenance of said lock and dam as above set out has been since its completion in October, 1911, and will forever hereafter be, to form a pool of still or slack water above same extending up said river and into said Whiteoak Creek and into and upon this plaintiff's land, and that said pool so formed obstructs

6 and impedes the waters of said Whiteoak Creek in their natural flow and forces same out of the natural banks and channel of said creek and causes the waters of said river and creek so obstructed and impeded, held back, and dammed up to flow out of said banks and upon and over the lands of plaintiff to such an extent that at the usual and ordinary stage of water in said pool that about seven acres of plaintiff's said bottom land is thereby covered with water, destroyed, and made worthless, and that when

the usual and ordinary hard rains occurring during the winter and spring months and during the cropping seasons come, as they will and do each year, the waters thereof and the tides and freshets thereby formed in said creek and said river have been solely by reason of the construction, operation, and maintenance of said lock and dam and the pool of still or slack water thereby formed continuously caused to spread out and overflow and stand and remain upon and seep through plaintiff's said land to such an extent that all of said seven acres heretofore mentioned and about three acres additional of plaintiff's land will be forever hereafter destroyed, damaged, rendered wet, sloppy, and boggy, and unfit for cultivation and made worthless therefor, making a total of ten acres so injured and destroyed and rendered worthless, which said ten acres is, and has always been, by far the best and most valuable portion of said farm; that the same is, and has always been, extremely valuable, rich, fertile, and productive.

Plaintiff says that the backwater formed in said creek at
7 pool stage covers a considerable portion of his said land and that only a slight rise or tide of from one to three feet will cause the overflow of said bottoms to the amount of seven acres as aforesaid, and that rise of from seven to ten feet will throw or cause the water to flow over the whole of the ten acres aforesaid, thereby rendering the whole of the said ten acres uncertain and unfit for cultivation, much of the same, to wit, about seven acres, being wet, boggy, and unfit for cultivation at all, and, as plaintiff believes, will never be fit for cultivation any more, and plaintiff says by reason of the damming up and obstructing the said river, as hereinbefore stated, he has been injured and damaged in the behalves herein mentioned in the sum of $1,100.00.

Paragraph two.

Plaintiff further states that the home or residence upon said farm is located upon the hill land west of the bottom land hereinbefore described and in the west side of said creek; and that he owns and the farm owned by this plaintiff has always been used and enjoyed a private passway leading from said farm residence down through said bottom lands and across said Whiteoak Creek and on through the lands of I. S. Brown to the public road, at and near the steamboat landing at Mills Springs, Kentucky, a place at which a public ferry is kept, and the nearest and most convenient route to market, post office, and the courthouse at Monticello, Kentucky, and which said wharf and steamboat landing could be reached from said farm residence over the said private passway at a distance of not
8 exceeding a mile and a quarter, and *and* he now says that by reason of the construction of the lock and dam aforesaid the water has been backed up and forced into Whiteoak Creek at such a great depth as to render the same impassable and that it cannot be

forded at pool water, and at the lowest stage thereof, either on horseback or any other way, thereby completely destroying the easement that had always belonged to said farm, to wit, the private passway aforesaid.

Plaintiff further says that by reason of the destruction of his said private passway it has rendered necessary and it is the only way for this plaintiff to reach Mill Springs to travel a distance of between five and six miles and over a rough road, and has so hemmed in the balance of said farm by shutting off the passway aforesaid as to injure and damage the sale thereof in the further sum of one thousand dollars.

Plaintiff further says that no proceedings have ever been instituted to condemn his land hereinbefore described or any part thereof for public use, or for any purpose, and that this plaintiff has never received any compensation from said defendant, the United States of America, or anyone else for the injuries herein complained of, or any part thereof; and that by the said acts of the said defendant, its agents, servants, officers, and employees hereinabove set out this plaintiff has been damaged in the sum of $2,100.

Wherefore the plaintiff prays judgment upon the facts and law of this case and prays that he recover of the defendant, the
9 United States of America, the sum of $2,100.00, and for such further orders, judgments, and decrees as may be necessary in the premises, for his costs herein expended and for all other further, necessary, and proper relief.

W. R. CRESS,
By CRESS & SON, *Attys.*

The affiant, W. R. Cress, says that the statements contained in the foregoing petition are true, as he verily believes.

W. R. CRESS.

Subscribed and sworn to before me by W. R. Cress this October 17th, 1912.

H. C. CRESS,
Notary Public, Wayne County, Kentucky.

Summons and return.

(Filed November 8th, 1912.)

The President of the United States of America; to the Marshal of the Eastern District of Kentucky, greeting:

You are commanded to summon the United States of America, to answer on the first day of the next November term of the District Court of the United States for the Eastern District of Kentucky, to be held at the city of London, a petition filed against it in said court by W. R. Cress, and warn it that upon its failure to answer the peti-

tion will be taken for confessed or it will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said court.

10 Witness, Hon. A. M. J. Cochran, Esq., judge of the District Court of the United States at London, in the said district, this 1st day of November, in the year of our Lord 1912, and of our independence the 137th year.

J. W. MENZIES, *C. D. C. E. D. of Ky.*,
By GEO. C. MOORE, *D. C.*

(Endorsed:) Received Covington, Kentucky, November 2nd, 1912. Executed November 4th, 1912, by handing a copy to Edwin P. Morrow, U. S. district attorney eastern district of Kentucky.

A. B. PATRICK, *U. S. M.*,
By SAM S. SHEPHERD, *Deputy.*

Fees, $2.00.

Summons and return.

(Filed Feb. 8th, 1913.)

The President of the United States of America; to the Marshal of the Eastern District of Kentucky, greeting:

You are commanded to summon the United States of America, to answer on the first day of the next May term of the District Court of the United States for the Eastern District of Kentucky, to be held at the city of London, a petition filed against it in said court by W. R. Cress, and warn it that upon its failure to answer the petition will be taken for confessed or it will be proceeded

11 against for contempt; and you will make due return of this summons on the first day of the next May term of said court.

Witness Hon. A. M. J. Cochran, Esq., judge of the district court of the United States at London, in the said district, this 27th day of January, A. D. 1913, and of our independence the 137th year.

J. W. MENZIES, *C. D. C. E. D. of Ky.*,
By GEO. C. MOORE, *D. C.*

(Endorsed:) Received February 1st, 1913, at Covington, Kentucky. Executed February 7th, 1913, at Covington, Kentucky, by handing a copy of this summons and also a certified copy of petition in this case to E. P. Morrow, United States district attorney for the Eastern District of Kentucky.

A. B. PATRICK, *U. S. M.*
By SAM S. SHEPHERD, *Deputy.*

Fee, $4.00.

Affidavit.

(Filed February 24th, 1913.)

United States District Court, Eastern District of Kentucky, sitting at London.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES, DEFENDANT.

12 STATE OF KENTUCKY,
County of Wayne, ss:

The affiant, H. C. Cress, states that he is a member of the firm of W. R. Cress and Son, and as such is of counsel for the plaintiff, W. R. Cress.

Affiant states that on February 8th, 1913, he sent by registered mail to Hon. George W. Wickersham, Attorney General for the defendant, United States, at Washington, D. C., a certified copy of the petition filed by the plaintiff herein.

Affiant files herewith as part hereof a copy of the letter enclosed, with the certified copy of plaintiff's petition, a register receipt showing the delivery of the same, duly stamped, to the postmaster at Monticello for registration, and the receipt of the said Attorney General showing the delivery of same to him.

H. C. CRESS.

Subscribed and sworn to before me by H. C. Cress this February 17th, 1913.

A. J. CRESS,
Notary Public, Wayne County, Kentucky.

My commission will expire January 17, 1914.

(Map impracticable to copy into record. Original attached hereto. The map referred to is exhibit filed with answer, which answer appears on page 14.)

(Here follows map, marked page 13.)

14 *Answer.*

(Filed June 28, 1913.)

United States District Court Eastern District of Kentucky, London, Kentucky.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT.

Comes the defendant, the United States of America, and says that it does not have sufficient knowledge or information to form a belief

as to whether or not W. R. Cress is the owner of or in the actual possession of the boundary of land set up and described in his petition herein, or any part thereof, and therefore denies that the said W. R. Cress is the owner thereof or of any part thereof.

Defendant denies that said farm consists of 189 acres, denies that about twelve acres of the same are bottom land, and denies that any number of acres are upper bottom land or lower bottom land. Defendant denies that Lock and Dam No. 21, erected at a point known as Ganns Island is so backed up or obstructed or raised the natural level of said water in the Cumberland River or at the mouth of Whiteoak Creek, or on the bank thereof adjoining the plaintiff's farm, to a height of about 15 feet, but avers that said water at said
15 point is only 10.7 above the ordinary and usual low-water mark, and was only raised 10.7 feet by the reason of the erection of said lock and dam. The defendant denies that the effect of said lock and dam has been such as to cause the waters of Whiteoak Creek to flow out of its said banks or above or over the lands of the plaintiff to such an extent that the usual and ordinary stages of said water in said pool at about 7 or any other number of acres, except as hereinafter set out is thereby covered with water or destroyed or made worthless; denies that since the ordinary and usual hard rains occured during the winter and spring months, or during the cropping season as they will or do each year, the tides or freshets thereby formed in Whiteoak Creek, and by reason of the construction and maintenance of said lock and dam are caused continuously or at all to spread out, overflow, or stand upon or remain upon or seep through plaintiff's land to such an extent that all or any part of said 7 acres set up in the petition, or 3 acres additional or any other number of acres will be thereafter forever destroyed or damaged or rendered wet or sloppy or boggy or unfit for cultivation; denies that by reason of the erection of said lock and dam that the defendant has thereby rendered 10 acres, or any other number of acres, worthless or destroyed the same; denies that said 10 acres has been heretofore or at all the best or most valuable portion of said farm; denies that the same has been always extremely valuable or rich or fertile or productive. The defendant denies that the back water formed in said creek covered a considerate portion of plain-
16 tiff's said land; denies that only a slight rise of tide, or from one to three feet, will cause the overflow of his said bottoms to the amount of 7 acres, or any other number of acres, as aforesaid; denies that thereby or at all said 10 acres are rendered uncertain or unfit for cultivation; denies that any portion thereof has been rendered wet or boggy; denies that he has thereby been damaged in the sum of $1,100.00 or any other sum, except as hereinafter stated. The defendant denies that the plaintiff owns or has always or at all owned or enjoyed a private or a passway leading from said farm residence to the said bottom lands and across Whiteoak Creek and on through the land of I. S. Brown to the public road at and near the steamboat landing at Mills Springs, Kentucky; denies that by the

erection of said lock and dam his said roadway has been at all destroyed or completely destroyed; denies that said Whiteoak Creek could not be used as a ford and crossing; and denies that the plaintiff's only way of reaching Mills Springs is to travel a distance of between five and six or any other number of miles over a rough road; and denies that by reason thereof his farm has been hemmed in or damaged or injured in the sum of $1,000.00, or any other sum. Defendant denies that the plaintiff has been damaged by reason of the erection of lock and dam, or by reason of the things set up in his petition, in the sum of $2,100.00, or any other sum except as herein stated.

II.

The defendant for further answer herein admits the erection of lock and dam set up and complained of in the plaintiff's petition, but avers that by reason thereof the waters of Cumberland River and White Oak Creek immediately adjoining the land of the plaintiff has not been raised to a greater height than 10.7 feet, and avers that only so much of the land of W. R. Cress as lies between the low original low-water line and the new low-water line 10.7 feet higher has been permanently taken, which amounts in all to about 3/100 acres of which was tillable and which is practically worthless. Defendant further avers that no more than 6.6 acres are injured or damaged to any extent whatever by reason of the construction of the said lock and dam, and of this only 6 and 1/100 acres are tillable. Defendant further avers that the water does not stand upon said land so as to constitute a taking thereof, and has not totally destroyed the same for cultivating purposes, but that the same can still be and continued to be used for the purpose of planting and raising crops, and it will be at all times valuable for grazing and grass purposes; that said land has not been damaged to a greater extent than $50.00 per acre for the tillable portion thereof, and no more than $5.00 per acre for the nontillable portion thereof. 17

The defendant further says that the roadway set up and described in the plaintiff's petition, and for which he claims damages, is entirely upon the property of I. S. Brown, and is owned by the said I. S. Brown, and denies that the said W. R. Cress is entitled to damages in any sum therefor. The defendant further says that the said ford and roadway set up and described in the plaintiff's petition has always been subject to overflows during the ordinary stages of high water, at which time the same was not fordible and could not be used as a road or passway. 18

Defendant files herein and makes a part of his answer herein a map showing the location of the premises and the extent of the overflow of said land, and makes the same a part of its answer herein.

Wherefore, having answered, the United States prays to be hence dismissed, with its costs herein expended.

EDWIN P. MORROW,
U. S. Attorney Eastern District of Ky.

Order.

(Filed Sept. 29th, 1913.)

This day came the plaintiff, and on his motion, the court being advised, it is now ordered that this cause be, and the same is, specially set for trial on Thursday, October 23rd, A. D. 1913.

Order.

(Filed October 25, 1913.)

This day came the parties, plaintiff and defendant, by their respective attorneys, and announced ready for trial before the court and without the intervention of a jury herein. The court heard evidence, and, not being fully advised, takes time, and said evidence is submitted.

19 *Order.*

(Filed April 14th, 1914.)

On the court's own motion, it is now ordered that this cause be, and same is, continued generally.

Affidavit.

(Filed December 23rd, 1913.)

District Court of the United States, Eastern District of Kentucky, Covington.

W. R. CRESS, PLAINTIFF,
v.
UNITED STATES, DEFENDANT.

The affiant, W. R. Cress, states that he had subpœnaed as witnesses in his behalf in the trial of the above-styled cause, each of whom attended at the trial of said cause in obedience to said subpœna, viz: Sam Coe, whose post-office address is Bud, Kentucky; Lewis Richardson, whose post-office address is Faubush, Kentucky; and H. B. Christian, whose post-office address is Rankin, Kentucky.

Affiant says that he paid the expenses of Sam Coe as a witness, as follows: Train fare from Burnside, Ky., to Cincinnati, and return, $10.10; auto fare from Mills Springs to Burnside, Kentucky, and return, $2.00; board and lodging for witness, four days, $6.00; total, $19.10. That he paid to Lewis Richardson, witness, as follows:

20 Train fare from Somerset, Kentucky, to Cincinnati, and return, $9.70; to horse hire from his home at Faubush to Somerset, $1.50; to board and lodging, four days, $6.00; total, $17.20.

That he paid H. B. Christian, train fare from Burnside, Kentucky, to Cincinnati, Ohio, and return, $10.10; auto fare from Mills Springs to Burnside, Kentucky, and return, $2.00; board and lodging for witness, four days, $6.00; total, $19.10. Total for witnesses, $55.40.

The affiant says that the above and foregoing were all of the witnesses subpœnaed by him and all to whom he paid any expenses, and that the above and foregoing account includes nothing except train fare, auto fare, horse hire, board and lodging, all of which were necessary expenditures in the traveling and attendance upon said trial.

W. R. CRESS.

Subscribed and sworn to before me by W. R. Cress December 11th, 1913.

H. C. CRESS,
Notary Public, Wayne County, Kentucky.

Opinion.

(Filed August 14, 1914.)

United States District Court, Eastern District of Kentucky.

W. R. CRESS, PLAINTIFF,
v.
UNITED STATES, DEFENDANT.

21 This is a suit by the plaintiff, W. R. Cress, against the defendant, United States, to recover compensation for the taking of certain real estate in this district by the erection of Lock and Dam No. 21 on the Cumberland River. I make the following findings of fact, to wit:

1st. That at the time of the erection of the dam the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of Cumberland River, and a short distance away from the river, conveyed to him by the commissioner of the Wayne Circuit Court by deed dated May 17th, 1910.

2nd. That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and so as to depreciate it one-half of its value.

3rd. That by reason of the erection thereof a ford across Whiteoak Creek and a part of a pass-way is destroyed.

4th. That the 6.6 acres of land was worth $150 an acre, or $990, and the damages thereto is $495.

5th. That the damage to the land by the destruction of the ford was $500.

I conclude that the plaintiff is entitled to recover the sum of $995.00.

A. M. J. COCHRAN, *Judge.*

AUG. 15, 1914.

Order.

(Filed Aug. 25th, 1914.)

This cause having been submitted for a final decree, and finding of facts having heretofore been filed, and no exceptions
22 taken thereto, it is now ordered by the court that the plaintiff have and recover of the United States of America the sum of nine hundred and ninety-five ($995.00) dollars, as set out in said finding of facts, and their costs properly recoverable herein.

Petition for writ of error.

(Filed Feb'y 15, 1915.)

In the District Court of the United States for the Eastern District of Kentucky, held at Covington, April term, 1914.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } 2875.

At law. Petition for writ of error.

Now comes Thomas D. Slattery, United States attorney within the eastern district of Kentucky for and on behalf of the United States, defendant herein, and says that on or about the 25th day of August, 1914, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

23 Wherefore the defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

THOMAS D. SLATTERY,
United States Attorney.

Assignment of error.

(Filed Feb'y 15, 1915.)

In the United States District Court for the Eastern District of Kentucky, held at Covington, April term, 1914.

W. R. CRESS, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 875.

Assignment of errors.

The defendant in this action, the United States of America, by its attorney, Thos. D. Slattery, United States attorney, in connection with its petition for writ of error makes the following assignment of errors which it avers exists.

24 First.

The court erred in concluding as a matter of law that the plaintiff is entitled to recover of the defendant the sum of nine hundred and ninety-five ($995.00) dollars, because the court's findings of fact show that neither said six and six-tenths acres of land nor said ford was taken within the meaning of section 5 of the amendment to the Constitution.

Second.

The court erred in adjudging that the plaintiff recover of the defendant the sum of nine hundred and ninety-five ($995.00) dollars.

Third.

The court errred in adjudging that the plaintiff recover of the defendant anything herein, because the findings of fact show that the six and six-tenths acres of land and the ford were not private property taken for public uses within the meaning of the 5th amendment to the Constitution.

Fourth.

The court erred in adjudging that the plaintiff recover of the defendant nine hundred and ninety-five ($995.00) dollars, or anything herein, because the damages to the plaintiff's property were purely consequential, speculative, and remote, and there was not a

taking of plaintiff's property for which compensation should be made within the meaning of the 5th amendment to the Constitution.

25 Fifth.

The court erred in adjudging a recovery to the plaintiff against the defendant for the reason that the damages to plaintiff's land are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Sixth.

The court erred in adjudging that the defendant is liable for any costs incurred.

Seventh.

The court erred in entering judgment in favor of the plaintiff against the defendant.

Wherefore the defendant prays that the judgment be reversed.

THOMAS D. SLATTERY,
United States Attorney.

Order.

(Entered and filed Feb'y 15, 1915.)

This 15" day of February, 1915, comes the defendant, the United States of America, by Thos. D. Slattery, United States Attorney within the Eastern District of Kentucky, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings
26 and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court allows the writ of error.

Writ of error.

(Filed Feb'y 15, 1915.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court of the United States for the Eastern District of Kentucky, before you or some of you, between the United States of America, defendant, and W. R. Cress, plaintiff, a manifest error hath happened, to the great damage of the said United States of America, defendant, as by its complaint appears;

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,
27 to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days of the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what by right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 15" day of February, in the year of our Lord one thousand nine hundred and fifteen.

J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky.

The foregoing writ is hereby allowed.

A. M. J. COCHRAN,
United States District Judge of the Eastern District of Kentucky.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. R. Cress:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States beholden at the city of
26 Washington on the 15" day of March, 1915, next, pursuant to a writ of error in the clerk's office of the District Court of the

United States for the Eastern District of Kentucky, wherein the United States of America is defendant and you are plaintiff in error, to show cause, if any there be, why the judgment rendered against the said defendant in error, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Maysville, Kentucky, in the district above mentioned, this 15th day of February, A. D. 1915.

A. M. J. COCHRAN,
United States District Judge for the Eastern Dist. of Ky.

Attest:

J. W. MENZIES,
Clerk United States District Court for the Eastern District of Kentucky.

I acknowledge service of the within citation this 17th day of February, 1915.

W. R. CRESS & SON,
Attorney for Plaintiff.

29 UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the District Court of the United States for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing pages contain a full, true, and complete copy of the record in the case of W. R. Cress vs. United States, No. 2875, with the exception of the bill of evidence, which is not included herein, as the same appears from the original now on file in this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 19th day of February, A. D. 1915.

[SEAL.] J. W. MENZIES,
Clerk U. S. District Court, Eastern District of Kentucky.

30 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. R. Cress:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States beholden at the city of Washington on the 15 day of March, 1915, next, pursuant to a writ of error in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein the United States of America is defendant and you are plaintiff in error, to show cause, if any there be, why the judgment rendered against the said de-

fendant in error, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Maysville, Kentucky, in the district above mentioned, this 15 day of February, A. D. 1915.

A. M. J. COCHRAN,
A. M. J. COCHRAN,
United States District Judge
for the Eastern Dist. of Ky.

Attest.

J. W. MENZIES,
Clerk United States District Court for the
Eastern District of Kentucky.

I acknowledge service of the within citation this 17 day of Feb., 1915.

W. R. CRESS & SON,
Attorney for Plaintiff.

31 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court of the United States for the Eastern District of Kentucky, before you or some of you, between the United States of America, defendant, and W. R. Cress, plaintiff, a manifest error hath happened, to the great damage of the said United States of America, defendant, as by its complaint appears.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days of the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what by right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court the 15 day of February, in the year of our Lord one thousand nine hundred and fifteen.

J. W. MENZIES,
Clerk District Court of the United States
for the Eastern District of Kentucky.

The foregoing writ is hereby allowed.

A. M. J. COCHRAN,
United States District Judge
for the Eastern District of Kentucky.

Filed Feb. 15, 1915.

J. W. MENZIES,
U. S. Clerk.

(Indorsement on cover:) File No. 24621. E. Kentucky D. C., U. S. Term No. 877. The United States, plaintiff in error, vs. W. R. Cress. Filed March 18, 1915. File No. 24621.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR, v. W. R. CRESS. } No. 84.

THE UNITED STATES, PLAINTIFF IN ERROR, v. ACHILLES KEELY ET AL. } No. 718.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance case No. 718, to be heard with No. 84 as one case, for hearing on a day convenient to the court. It is suggested that the date of joint hearing be made the first Monday in December next.

These are suits to recover damages to and the value of certain lands, etc., of defendants in error, alleged to have been either permanently destroyed or taken by the United States in the improvement

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of navigable waters, without the payment of just compensation.

The legal points are the same in both cases and they can be conveniently argued together on behalf of the United States at one hearing.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

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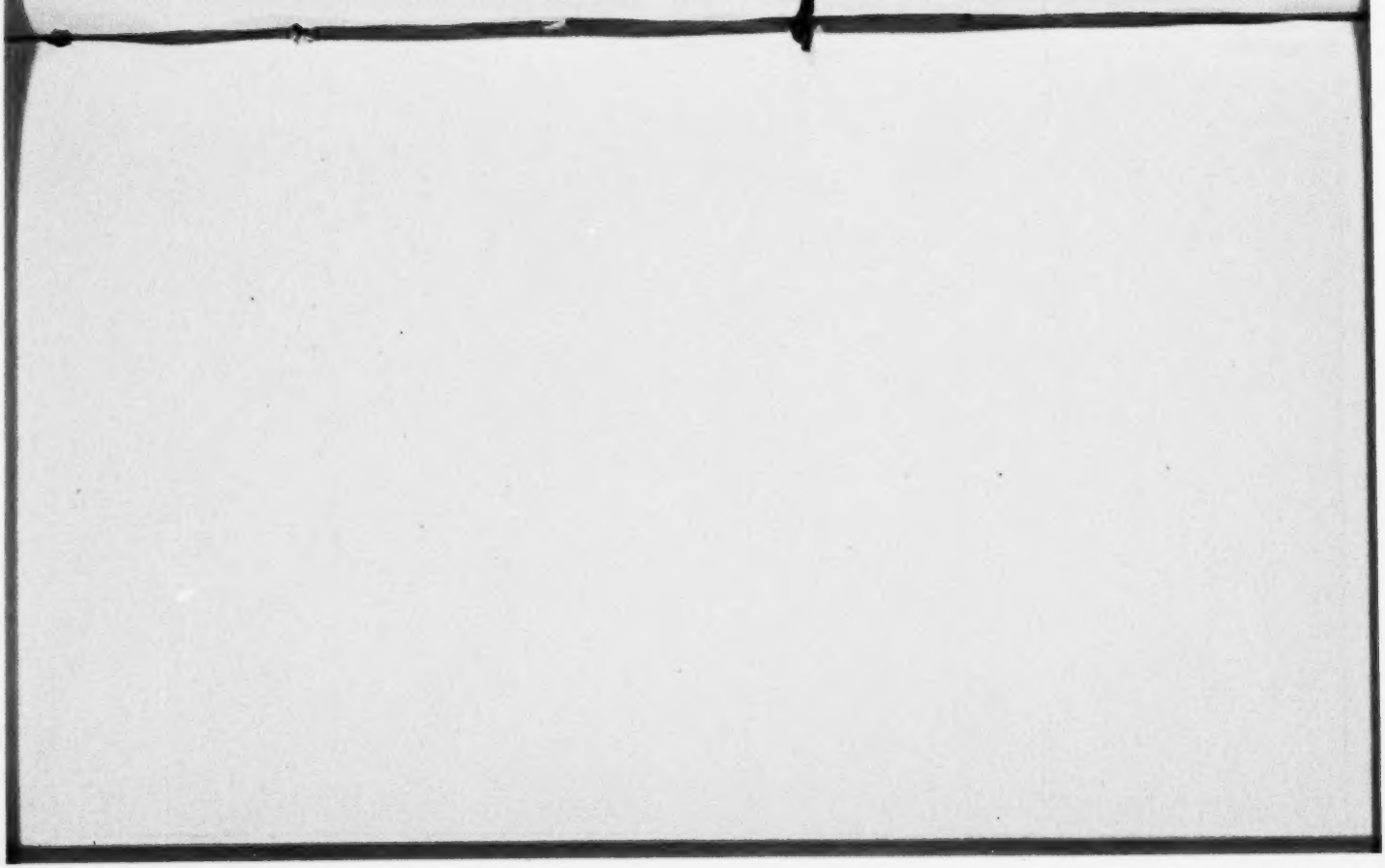

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
W. R. CRESS. } No. 84.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant in error was the owner of a tract of land on Whiteoak Creek, a tributary of the Cumberland River, in Wayne County, Kentucky. The property in question was located approximately 1,000 feet above the confluence of the creek and the river. Defendant in error used a ford across Whiteoak Creek for the purpose of getting from his land to the land of I. S. Brown and thus reaching the steamboat landing at Mills Springs, Kentucky.

The Government erected Lock and Dam No. 21 on the Cumberland River below the mouth of Whiteoak Creek. This backed the water up the river and also up Whiteoak Creek, and caused 6.6 acres of the land

of defendant in error to be subject "to frequent overflows of water from the river" so as to depreciate it one-half of its value. It also raised the water line in the creek, and, in the language of finding 3 (Rec. 11), "a ford across Whiteoak Creek and a part of a passway is destroyed."

The court allowed defendant in error $495 as damages to the 6.6 acres, and $500 as "damage to the land by the destruction of the ford." (Finding 5, Rec. 11.)

As there is no opinion in this case, and as the findings do not agree with the petition and are so very limited, it is difficult to discover upon what theory the court reached its conclusions. Reading the findings (Rec. 11) as a whole the Government understands the court's position to be that because the said 6.6 acres of land were depreciated one-half of their value, due to frequent overflows, this constituted a taking; that as a ford between the land of defendant in error and that of Brown across Whiteoak Creek which the former used in order to reach the steamboat landing on the Cumberland River was destroyed, the same decreased the value of the land of defendant in error, and that damages should be allowed for the decrease in value by reason of the destruction of the ford.

For convenience the findings (Rec. 11) are set forth in full, as follows:

> 1. That at the time of the erection of the dam the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of Cumberland River, and a short distance away

from the river, conveyed to him by the Commissioner of the Wayne Circuit Court by deed dated May 17th, 1910.

2. That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and so as to depreciate it one-half of its value.

3. That by reason of the erection thereof a ford across Whiteoak Creek and a part of a passway is destroyed.

4. That the 6.6 acres of land was worth $150 an acre, or $990, and the damages thereto is $495.

5. That the damage to the land by the destruction of the ford was $500.

The Government's position is that finding 2 on its face demonstrates that there was no taking of the land, in that it was not made "absolutely valueless," "permanently injured," or "permanently flooded"; that defendant in error, so far as the record shows, never had an easement over the premises of his neighbor Brown; that whatever interest defendant in error had in the ford which was destroyed, since none of his land was taken, was subject to the paramount right of the Government to use the bed of the stream within its banks in aid of the navigable capacity of the Cumberland River; that the Government is not liable for the costs taxed in this case.

ASSIGNMENTS OF ERROR.

First. The court erred in concluding as a matter of law that the plaintiff is entitled to recover of the defendant the sum of nine hun-

dred and ninety-five ($995) dollars, because the court's findings of fact show that neither said six and six-tenths acres of land nor said ford was taken within the meaning of section 5 of the amendment to the Constitution.

Second. The court erred in adjudging that the plaintiff recover of the defendant the sum of nine hundred and ninety-five ($995) dollars.

Third. The court erred in adjudging that the plaintiff recover of the defendant anything herein, because the findings of fact show that the six and six-tenths acres of land and the ford were not private property taken for public uses within the meaning of the fifth amendment to the Constitution.

Fourth. The court erred in adjudging that the plaintiff recover of the defendant nine hundred and ninety-five ($995) dollars, or anything herein, because the damages to the plaintiff's property were purely consequential, speculative, and remote, and there was not a taking of plaintiff's property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

Fifth. The court erred in adjudging a recovery to the plaintiff against the defendant for the reason that the damages to plaintiff's land are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Sixth. The court erred in adjudging that the defendant is liable for any costs incurred.

Seventh. The court erred in entering judgment in favor of the plaintiff against the defendant.

BRIEF OF ARGUMENT.

I. The damage to the land of defendant in error from overflow did not measure up to a taking under the fifth amendment to the Constitution, but was only a partial injury, for which the Government is not liable.

II. Defendant in error, so far as the record shows, did not have an easement over the premises of I. S. Brown, and could not, therefore, recover damages to his property by the destruction of a ford.

III. No land having been taken or easement destroyed, whatever interest defendant in error had in the ford was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Cumberland River.

IV. The Government is not liable for the costs taxed in this case.

ARGUMENT.

I.

The damage to the land of the defendant in error from overflow did not measure up to a taking under the fifth amendment to the Constitution, but was only a partial injury for which the Government is not liable.

In discussing the subject of a taking under the fifth amendment to the Constitution with respect to the flooding of real property by backing up of rivers, this court has used such language as "destroying the entire value" of the land; "total destruction"; "substantial destruction." In the case of *United States* v. *Lynah*, 188 U. S. 445, 470, the court has said that a taking results in "an actual appropriation of the land, including the possession, the right of possession, and the fee." By finding 2 (Rec. 11) the damage to the land in question is clearly left outside these definitions when it declares "That by reason of the erection of the lock and dam 6.6 acres of this land is subject to frequent overflows of water from the river and *so as to depreciate it one-half of its value.*"

This court has always been careful to distinguish between property taken by the Government and that which has been merely damaged. The leading decision on the question of the taking of property by overflow as a result of the construction of river and harbor improvements is that in the *Lynah case* (*supra*). There a cross-tide dam was erected in the

Savannah River. The waters were raised to such a height that Lynah's land, located at some distance above the dam, was permanently submerged to a depth of 18 inches. The result was that there was a total destruction of the plantation for the cultivation of rice, for which it was chiefly valuable, and hence a destruction of its market value. This court held that the permanent overflow of the plantation was equivalent to a taking by the United States within the meaning of the fifth amendment and that the law raised an implied contract to make just compensation. Mr Justice Brewer, speaking for the court, said (p. 470):

> While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the Government and it becomes henceforth the full owner.
>
> *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.
> *Jackson* v. *The United States*, 230 U. S. 1.
> *Willink* v. *The United States*, 240 U. S. 572.

A comparison of the facts in the ~~foregoing~~ Lynah cases with those in the case at bar shows a distinct line of cleav-

age. There is no finding in the case at bar that there was any land made valueless, permanently injured, or permanently flooded. On the contrary the findings refute such an idea. Moreover, the possession or fee to the land has not passed. If the determining factor be that the title and possession shall pass to the United States as in ordinary condemnation proceedings, then the facts in this case fall far short of a taking.

The findings, however, do present a case where there has been some damage done to the real property by frequent overflows, and a consequential and remote damage to the real property due to the destruction of a ford across Whiteoak Creek. Hence in these particulars it comes within the line of the decisions as exemplified by the case of *Gibson* v. *The United States*, 166 U. S. 269, 275. In this case access to plaintiff's land, situated on Neville Island in the Ohio River below Pittsburgh was impeded and as a consequence the land was depreciated in value from $600 to $200 per acre. This court held that it was not a taking of private property by the Government for which compensation must be made, and that the injury complained of was damnum absque injuria.

> The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental con-

sequence of the lawful and proper exercise of a governmental power.

Scranton v. *Wheeler*, 179 U. S. 141.
Bedford v. *United States*, 192 U. S. 217.
Jackson v. *United States*, 230 U. S. 1.

Particular attention is called to the case of *Highbridge Lumber Company* v. *United States* (69 Fed. 320, 326). The late Mr. Justice Lurton, as circuit judge of the United States Circuit Court of Appeals, summarizing the conclusion of the court, said:

> What we hold is: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. That such injuries are apprehended in respect of lands of plaintiff in error not condemned gives no greater right to recover than if the purpose was to construct the proposed dam on the land of a third person. Second. To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder, and amount to a "taking" of such land, is premature. The remainder has not yet been "taken," and until it has been appropriated in fact, by permanent flooding, no right to be compensated will accrue. Third. Neither the anticipated change in the current of the river, nor the anticipated increase in danger from fire during the work of construction, are proper subjects for compensation. Both are injuries

purely consequential, and constitute no actionable claim against the Government.

Jonathan Walls v. *United States*, 44 C. Cls. 482.

Tompkins, extrx. v. *United States*, 45 C.Cls. 66.

Mills v. *United States*, 46 Fed. 738.

II.

Defendant in error, so far as the record shows, did not have an easement over the premises of I. S. Brown and could not therefore recover damages to his property by the destruction of a ford.

It is essential to the claim of defendant in error for damages to his land by the destruction of a ford that he have an easement in a passway over the premises of I. S. Brown. The petition does not allege an easement; the answer denies an easement, and the court does not find that defendant in error had an easement in the passway or the ford and makes no reference to a grant or prescriptive right over Brown's premises. The burden is upon the defendant in error to prove an easement by either grant or prescription. He obviously failed to do this for if he had it would have been incumbent upon the court to so find. There being, then, no destruction of an easement, the damage alleged to be done by the destruction of a ford is too remote and consequential to be chargeable to the Government.

According to the findings defendant in error purchased his farm May 17, 1910, about one year and a half before this proceeding was begun. He alleges

(Rec. 4, par. 2) that "the farm owned by this plaintiff has always been used and enjoyed a private passway leading from said farm residence down through said bottom lands and across said Whiteoak Creek and on through the lands of I. S. Brown to the public road, at and near the steamboat landing at Mills Springs, Kentucky." How did he acquire such ownership? Was it by grant or prescription? There is no record of a grant and no allegation showing how a prescriptive right had been obtained. It is, of course, but a mere legal conclusion to plead (Rec. 5) that "the easement that had always belonged to said farm" had been destroyed. By reference to the map on file in this case, as prepared by the Corps of Engineers, U. S. Army, and signed by Major S. H. Burgess, the cultivation line of I. S. Brown's land at the point where the ford crosses from the land of defendant in error to Brown's land is so close to the original cultivation line as to make practically no change. It may well be that the court could not find any damages to the land owing to the destruction of a passway on Brown's land and therefore confined itself, as it did, to damages due to the destruction of the ford.

Moreover, the Government in its answer (Rec. 8) denies that the defendant in error "owns or has always or at all owned or enjoyed a private or a passway leading from said farm residence to the said bottom lands and across Whiteoak Creek and on through the land of I. S. Brown to the public road at and near the steamboat landing at Mills Springs, Kentucky." And again (Rec. 9, par. 2)

denies any title on the part of defendant in error to the said road running over Brown's premises, and alleges "that the said ford and roadway set up and described in the plaintiff's petition has always been subject to overflows during the ordinary stages of high water, at which time the same was not fordable and could not be used as a road or passway." If, then, there is no finding of an easement in a right of way for the destruction of which defendant in error could recover, upon what does the court lodge its judgment for damages? The court finds "damage to the land by the destruction of the ford." As defendant in error owned to the middle of the stream, he could not recover for a passway on his own land up to that point, because the court does not find that there was any land taken. Neither can he recover for a passway from the middle of the stream over Brown's land, for the court abandoned any claim for damage to a passway. Furthermore, there is no finding that defendant in error had an interest equivalent to an appurtenant easement in a passway over Brown's land. Hence the question of any claim for damages is narrowed down to loss of value in the land of defendant in error by reason of the destruction of the ford. Here one enters the twilight zone in endeavoring to discover what is meant by damages for the destruction of the ford. The petition and answer are in direct conflict as to what right defendant in error had to the use of the ford, and the findings shed no light upon the source of his title.

One can readily perceive that the value of the land might be lessened by the destruction of the ford even though there was no prescriptive right, but the mere destruction would not entitle the riparian landowner to damages because of its lessening the value of the land. Thus the case differs radically both in fact and law from that of the *United States* v. *Welch*, 217 U. S. 333. Welch had "*a private deeded passway*" (Welch brief, p. 2) from his land over that of a party named Sewell to a county road. It was the only practical way of egress from and ingress to Welch's farm. Between the Welch and Sewell farms ran Four Mile Creek, which emptied into the Kentucky River. The passway in question crossed this creek and traversed Sewell's farm to a point where it connected with the county road. By the construction of a lock and dam in the Kentucky River the water was backed up the creek and out over the lands of both Welch and Sewell at a point where the passway crossed from Welch's farm to Sewell's farm. The land of both Welch and Sewell at the location of the ford was permanently and completely destroyed and the private passway for some distance on the Welch and Sewell farms was permanently flooded.

The lower court, in part, found that—

> The only practical outlet for plaintiffs, from their farm to the county road, was a private roadway running across the upper end of their bottom for about fifty yards, then over the

lands of Lizzie Sewell for about three hundred yards.

In order for plaintiffs to reach the county road, *since this private roadway was submerged,* they would have to go around on a ridge about two miles out of their way. The bluff they would have to go up in order to get on this ridge is very steep and it is not practical to make a road that way.

Plaintiffs *had a right of way* over the Sewell land, which lies on the opposite side of the creek from plaintiff's land and adjoins the county road. This private roadway was a good way to get out. *This roadway, by reason of a pool caused by the dam, stands about twelve to fourteen feet under water all the time.* The lands farther up the stream are owned by other parties, and plaintiffs have no right of way over them.

The destruction of this private roadway lessens the value of plaintiffs' farm at least $1,700. It was only about three hundred yards from plaintiffs' farm to the county road the way they had the right to go. The town of Ford is about three miles distant from their farm, and is the nearest post office, the nearest place to which they haul their crops.

The map found in the brief for the defendant in error in the Welch case shows that the private passway on each side of Four Mile Creek was permanently submerged and land taken beyond the banks of the creek.

Thus the Welch case and the one at bar differ principally in the following respects:

First. In the former the court finds there was land permanently submerged and taken, while here there is no taking, but only a partial and consequential damage.

Second. In the former there was an easement acquired by deed in a passway and the said passway was destroyed, while here there is no finding that there was an easement or a destruction of one, but only the destruction of a ford.

Third. In the former the Sewell land which the passway traversed was submerged by a permanent pool and thus taken, while here there was no land upon which there was a passway belonging to defendant in error, that the court found was taken nor, so far as we know, was there any of Brown's land taken.

In the case of the *United States* v. *Grizzard*, 219 U. S. 180, 184, 185, Mr. Justice Lurton, delivering the opinion of the court, said:

> If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated and leaving him uncompensated for the depreciation over benefits to that which remains.
>
> * * * * *
>
> Both the petition and the finding show that access to the public road has been cut off by the *intervention of flooded land actually taken.*
>
> * * * * *
>
> To say that such an owner would be compensated by paying him only for the narrow

> strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.

In the case at bar the court is asked to go far beyond what was found in either the Grizzard or the Welch case, and to award damages to the land of defendant in error by reason of the destruction of a ford where none of his land was taken, or, so far as we know, any of the land of his neighbor upon which a passway was located. Defendant in error seeks to recover, although it has not been found that he had an easement in this passway, or that this was the only practical way by which he could get to the landing on the Cumberland River.

The Government suggests that the allowance of a claim for damages to land by the destruction of a ford, where no land is taken or easement destroyed, would set a precedent of tremendous importance in the matter of governmental control of the navigability of rivers and harbors.

III.

No land having been taken or easement destroyed, whatever interest defendant in error had in the ford was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Cumberland River.

The Cumberland River is a navigable stream at its junction with Whiteoak Creek. This fact is evidenced by the allegation of the complaint (Rec. 4,

par. 2), that defendant in error enjoyed a private passway across the farm of I. S. Brown to the public road "at and near the steamboat landing at Mills Spring, Kentucky, a place at which a public ferry is kept and the nearest and most convenient route to market, post office, and the courthouse at Monticello, Kentucky, and which said wharf and steamboat landing could be reached from said farm residence over the said private passway at a distance of not exceeding a mile and a quarter."

As the lands of Brown were upstream from the junction with Whiteoak Creek, the foregoing quotation would indicate that steamboats passed up and down the river in front of Whiteoak Creek. Moreover, the court will undoubtedly take judicial notice that the records of the War Department and congressional action in the form of appropriations show that the Government has been dealing with the navigability of the Cumberland River ever since 1832. Its navigability is established by the fact that Congress has since that date exercised "commercial power" over this river.

In Gould on "Waters" (3d ed., sec. 72, p. 145), discussing the case of *McManus* v. *Carmichael*, the author says:

> * * * That the test of the navigability of the Mississippi River is ascertained by use or by public acts or declarations.

Since the Cumberland River is subject to the control of the Government for navigable purposes, its tributary, Whiteoak Creek, within its banks is subject

to the uses of the Government for navigable purposes, and anyone using a ford across the creek does so in subordination to the paramount right of the Government. It is evident that in order to make the river above the dam navigable it was necessary to raise the water. In doing this it backed up Whiteoak Creek, thereby destroying a ford which defendant in error had been using, but without taking any of defendant in error's land. In such a situation it would seem logical to say that the owner whose land abuts the creek is in the same position as if he were riparian owner along the banks of the Cumberland River. Congress in its control of the navigation of the Cumberland River, and the Secretary of War acting for it, must also control its tributaries. Otherwise it would be impossible in most instances to control the navigation of the river. The only way to prevent the water backing up in the creek would be to build a dam where it flows into the river. This would obviously be a practical impossibility for the reason that the floods would back up on the inside of the dam and ruin land on both sides of the creek. Moreover, if the main body of the river did not have the use of the creek for storage it might not have water sufficient to make a constant depth for navigation.

Mr. Justice McKenna in the case of *Greenleaf Johnson Lumber Company* v. *Garrison*, 237 U. S. 231, 263, said:

> When Congress acts necessarily its power extends to the whole expanse of the stream and is not dependent on the depth or shallowness of the water. To recognize such dis-

> tinction would be to limit the power when and where its exercise might be most needed.

If Congress has the power to assume control over and expend money to make a shallow stream navigable by backing up water behind a dam, it must also have the right to use the bed of a tributary within its banks to meet the same purpose—i. e., to regulate the navigable capacity of the stream.

Again, in Gould on "Waters" (3d ed. 1900, sec. 72, p. 145), in discussing the case of *McManus* v. *Carmichael*, the author said:

> It was held upon a full review of the earlier authorities that although the ebb and flow of the tide was the common-law test of navigability, yet the term "navigable" embraced not only the idea of *capacity for navigation* but also that of publicity. [Italics ours.]

In the case of the *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 703, the court said:

> Second, that it [the State] is limited by the superior power of the General Government to secure *the uninterrupted navigability* of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve the navigability of the navigable water courses of the country* even against any State action. [Italics ours.]
>
> *United States* v. *North Bloomfield Gravel Mining Company*, 81 Fed. 243. Affirmed, 32 C. C. A. 84. Also see Weil on "Water Rights" (3d ed., vol. 1, sec. 337, p. 358).

The language of the act of September 19, 1890 (26 Stat. 454, sec. 10), is suggestive:

> That the creation of any obstruction not affirmatively authorized by law to the *navigable capacity* of any waters in respect of which the United States has jurisdiction is hereby prohibited. [Italics ours.]

If the United States has control of the navigable capacity of a navigable stream, does it not also have the right to raise the water within the banks of one of the navigable stream's tributaries, by a dam in the river, just as much as to raise the water in a shallow part of the main course of the river?

It will be noted that the lower court speaks of the ford being "destroyed" and that the damages to the land by reason of the destruction of the ford were $500. Was this passway and ford the only practical means by which the steamboat landing could have been reached, as in the *Welch case, supra*? There is no finding that it was the only practical place. There is nothing to indicate that he could not have crossed the creek in a boat or ferry, or, if necessary, swung a bridge. At the point where the ford was located it was a very narrow stream, as indicated by the map, and this could have been done. The fact that it would entail some expense to do this would not constitute a taking.

Manigault v. *Springs*, 199 U. S. 473.

Admitting for the sake of the argument only that defendant in error had an easement over a passway crossing the Whiteoak Creek, can it be said that

there was a destruction amounting to a "taking" where he still might have gotten over by many other means than wading? The burden being upon him to prove a destruction equivalent to a taking, and the court having failed to find facts from which such an inference could be drawn, the situation would seem to indicate a partial damage, if he had an easement, rather than a destruction equivalent to a taking.

In view of the fact that none of his land was taken the proposition would seem to be very much like that in the case of *Mills* v. *United States, supra*. There the question arose over the filling up of drainage ditches in rice fields on the Savannah River by raising the river through the construction of a dam, so that it became necessary to provide new drainage costing $10,000, for which Mills claimed damages. The court held that Mills could not recover.

The C. B. & Q. Railway Co. v. *Drainage Commissioners*, 200 U. S. 561, p. 586;
Bedford v. *United States*, 192 U. S. 217.

Furthermore, if the Government had, from time immemorial and long before defendant in error or his grantors had forded the creek, the right to the free use of its bed for the run-off from the watershed above and these waters aided in the navigation of the river, by the same token it should have the right to the use of the bed of the creek within its banks for other navigable purposes, including that of backing water up from the river so long as no land was taken.

Assuming that the Government has such control of Whiteoak Creek the rights of the defendant in error would be the same as if he had been a riparian owner on the banks of the Cumberland River.

In *Gibson* v. *United States* (*supra*, p. 276) Mr. Chief Justice Fuller, speaking for the court, said:

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. * * *
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property and was merely incidental to the exercise of a servitude to which her property had always been subject.

Bedford v. *United States*, 192 U. S. 217.

Transportation Co. v. *Chicago*, 99 U. S. 635.

Scranton v. *Wheeler*, 179 U. S. 141.

Hood v. *United States*, 49 C. Cls. 669.

Zimmerman v. *Union Canal Co.*, 1 Watts and Sergeants Rep. 346 (Pa.).

IV.

The Government is not liable for the costs taxed in this case.

The judgment herein carries with it costs erroneously taxed against the United States. (Rec. 10, 11, 12.)

Prior to the enactment of the Judicial Code costs were properly taxable against the United States under the provisions of section 15 of "An act to pro-

vide for the bringing of suits against the Government of the United States," commonly known as the Tucker Act (24 Stat. 505). Section 297 of the Judicial Code, however, repealed all of the Tucker Act with the exception of sections 4, 5, 6, 7, and 10 (36 Stat. 1168). The petition in the case at bar was filed after the Judicial Code became effective, and hence there was no provision of law authorizing the taxation of costs against the United States.

In *The Antelope* (12 Wheat. 546, 550) the court said:

> It is a general rule that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the Government.
>
> *United States* v. *McLemore*, 4 How. 286.
> *United States* v. *Boyd*, 5 How. 291.
> *United States* v. *Verdiet*, 164 U. S. 213, 219.
> *Pine Ridge Logging Co.* v. *United States*, 186 U. S. 279, 296.

CONCLUSION.

For the reasons hereinbefore set forth it is respectfully submitted that the trial court erred in deciding against the Government on the claims presented and for costs, and that its judgment should be reversed in all respects.

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